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State of New Jersey
DEPARTMENT OF HUMAN SERVICES

DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES

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JOHN R. GUHL
Director

**STATE OF NEW JERSEY
DEPARTMENT OF HUMAN SERVICES
DIVISION OF MEDICAL ASSISTANCE
AND HEALTH SERVICES**

NEW LUCY PHARMACY,

PETITIONER,

V.

DIVISION OF MEDICAL ASSISTANCE :

AND HEALTH SERVICES,

RESPONDENT.

100

~~ADMINISTRATIVE ACTION~~

FINAL AGENCY DECISION

OAL DKT. NO. HMA 3090-09

OAL DKT. NO. HMA 1624-09

(CONSOLIDATED)

As Director of the Division of Medical Assistance and Health Services, I have reviewed the record in this matter including the Initial Decision, the contents of the OAL case file, Petitioner's Exceptions and Respondent's reply. Procedurally, the time period for the Agency Head to render a Final Agency Decision is August 27, 2009, in accordance with an Order of Extension.

I hereby ADOPT the findings, conclusions and recommended decision of the Administrative Law Judge in their entirety and incorporate the same herein by reference. In a thorough and well-reasoned decision, the ALJ found that good cause existed for the denial of Petitioner's application to be a Medicaid provider. After reviewing the entire record in this matter, I find no reason to disturb those findings.

The New Jersey Medical Assistance and Health Services Act provides that the Director may suspend, debar or disqualify for good cause any provider who is presently participating or who has applied for participation in the Medicaid program. N.J.S.A. 30:4D-17.1(a). The regulations set forth the circumstances in which DMAHS may exclude a provider from participating for the purpose of protecting the interest of the New Jersey Medicaid programs. N.J.A.C. 10:49-11.1(b). The regulation specifically provides that good cause to deny a provider from participating in the Medicaid program exists when there has been a violation of laws or regulations governing the conduct of regulated industries or when a provider has submitted a false or fraudulent application. See N.J.A.C. 10:49-11.1(d)(7) and (22). In this case, New Lucy Pharmacy failed to disclose adverse licensure action taken by the Board of Pharmacy for violations of pharmacy rules as well as criminal charges brought against its pharmacist-in-charge.

Question 36 of the provider application asked whether any of the entities named in the application, the owners or pharmacists have "ever been the subject of any past or pending license suspension, revocation or other adverse licensure action in this State or any other jurisdiction?" Samir Awad, the President and one of the owners of New Lucy answered "No" to this question. Question 37 of the application asked whether any of the owners or pharmacists have "ever been or currently are indicted, charged, convicted of or pled guilty to or no contest to any federal or state crime or offense in this state or any other jurisdiction?" Mr. Awad responded that he had been arrested for a signal traffic violation with a suspicion of driving under the influence, but that the charges had been dismissed in 2003. Paragraph 40 of the application is a certification which states:

For the purpose of establishing eligibility to receive direct payment for services to beneficiaries under the

New Jersey Medicaid (Title XIX or Title XXI) Program, I certify that the information furnished on this application is true, accurate and complete.

Mr. Awad certified these answers on July 1, 2008. The last sentence of the provider agreement states, "[t]he provider or DMAHS may, on 60 days written notice to either party, terminate this agreement without cause.

Upon review and further investigation of the application, DMAHS discovered that New Lucy had violated Board of Pharmacy (BOP) regulations, including failing to request allergy and other chronic conditions for 60% of its filled prescriptions and not including the "use by" date on its prescription labels. Petitioner subsequently settled the matter by signing an acknowledgement, agreeing to cease and desist from engaging in the violative conduct, paying a \$975 penalty and providing the BOP with a letter of correction. Significantly, the letter from BOP states: "Any disposition by way of settlement will be a public record and will have the same effect as an order of the Board." I FIND that such public disciplinary action as well as the payment of a monetary penalty is clearly adverse licensure action and therefore should have been disclosed on the provider application. Moreover, New Lucy's regulatory violations concerning the absence of relevant information in patient profiles provided another basis for denying the application pursuant to N.J.A.C. 10:49-11.1(d)(7). Indeed, as noted by the ALJ, those violations had the potential to negatively impact the health and safety of Medicaid recipients.

DMAHS also learned that Petitioner failed to disclose that criminal charges had been filed against Tamer Girgis, its pharmacist-in-charge, for attempting to obtain a controlled dangerous substance by presenting a forged prescription. Mr. Girgis subsequently pled guilty to unlawful possession of a prescription drug.


Petitioner argues that he attempted to answer the question truthfully, but Mr. Girgis lied about his criminal background. However, as noted by the ALJ and DMAHS, the regulatory good cause for denial of the application is based on the fact that a prospective provider has submitted a false or incorrect application. The regulation does not require that the provider intended to deceive, manipulate, or defraud Medicaid, in order for an application to be denied. Rather, the mere submission of false information is grounds for denial. Indeed, a provider must be held to a high standard in order to preserve the integrity of the Medicaid program. In this case, there is no question that the application contained false statements because it failed to disclose regulatory violations, the adverse licensure action and the criminal charges brought against the pharmacist-in-charge.

A provider must be held to a high standard in order to preserve the integrity of the Medicaid program. I am not persuaded that a provider who files an application with false information should receive the same benefit as a provider who has filed an accurate application. Reasonably, pursuant to N.J.A.C. 10:49-3.2(d)(3), New Lucy may reapply one year from the date of the denial.

THEREFORE, it is on this 17th day of August 2009,

ORDERED:

That the recommended decision affirming the denial of New Lucy's provider application is hereby ADOPTED as the Final Decision.



John R. Guhl, Director
Division of Medical Assistance
and Health Services



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. HMA 03090-09

OAL DKT. NO. HMA 01624-09

(CONSOLIDATED)

NEW LUCY'S PHARMACY,

Petitioner,

v.

**DIVISION OF MEDICAL ASSISTANCE AND
HEALTH SERVICES,**

Respondent.

Kevin H. Marino, Esq., and John A. Boyle, Esq. for petitioner
(Marino, Tortorella & Boyle, P.C.)

Dianna Rosenheim, Deputy Attorney General for respondent (Anne Milgram,
Attorney General of New Jersey, attorney)

Record Closed: May 6, 2009

Decided: May 26, 2009

BEFORE ELLEN S. BASS, ALJ:

STATEMENT OF THE CASE

Petitioner, New Lucy's Pharmacy, Inc., appeals the denial of its application to participate in the New Jersey Medicaid Program as a pharmacy services provider. The New Jersey Division of Medical Assistance and Health Services (DMAHS) contends

that good cause exists to deny the application because petitioner submitted a "false or fraudulent" application within the meaning of N.J.A.C. 10:49-11.1(d)(22), and violated "regulations governing the conduct" of the pharmacy within the meaning of N.J.A.C. 10:49-11.1(d)(7).

PROCEDURAL HISTORY

Petitioner's application was denied by letter from DMAHS dated January 20, 2009. Petitioner requested a hearing by letter dated January 30, 2009. On February 5, 2009 the matter was transmitted to the Office of Administrative Law (OAL) as a contested case bearing docket number HMA 01624-09.

Thereafter, DMAHS amended its denial by letter dated February 5, 2009. Petitioner requested a hearing as to the amended denial on February 11, 2009 and the matter was transmitted to the OAL as a contested case on February 26, 2009. This hearing request was assigned docket number HMA 03090-09.

With the consent of the parties, and in accordance with N.J.A.C. 1:1-17.3(a), the two matters were consolidated by order dated March 17, 2009. A hearing was held on April 15, 2009. Both parties were afforded an opportunity to submit written summations and the record closed on May 6, 2009.

ISSUE PRESENTED

Did good cause exist to deny petitioner's application as a Medicaid pharmacy services provider under N.J.A.C. 10:49-11.1(d)(7) and (22)?

FACTUAL DISCUSSION AND FINDINGS OF FACT

Background Facts

Much of the background history is not in dispute. Based on a joint stipulation filed by the parties, and the joint exhibits entered into evidence, I **FIND** the following **FACTS**:

1. Petitioner purchased the business assets of Ann-Lu, Inc. t/a Lucy's Pharmacy on or about March 21, 2008.
2. On March 21, 2008 Tamer Girgis (Girgis) applied for the position of Registered Pharmacist in Charge ("RPIC") and was hired as RPIC by petitioner.
3. In connection with its purchase of Lucy's assets, petitioner applied to the Board of Pharmacy (BOP) for a permit to conduct a pharmacy.
4. On May 1, 2008 the BOP conducted an inspection of petitioner's pharmacy. By letter dated May 29, 2008 the BOP notified petitioner that its application for a pharmacy permit had been approved. (J-4)
5. By letter dated June 4, 2008, (J-6), the BOP provided notice that on May 1, 2008 it had "preliminarily found" petitioner responsible for the following violations of BOP regulations:
 - a. "Allergies, idiosyncrasies, and chronic conditions, had not been entered into the patient profile system for all persons to whom medication was dispensed; nor had negative responses, which may have been received to any such inquires, been recorded; Specifically, from the Prescription Dispensing Analysis: 40% compliance."
 - b. On Rx 7004870, the name of the prescriber did not appear on the prescription label, nor was it entered into the patient profile system.
 - c. The pharmacy lacked a current comprehensive pharmaceutical reference text.

- d. No controlled dangerous substance inventory was taken on March 21, 2008, which is the date the change in ownership took place.
 - e. Prescription labels being used in the pharmacy did not have the phrase "use by" followed by the "use by" date.
- 6. In its June 4, 2008 letter, the BOP offered petitioner "an opportunity to settle this matter and thereby avoid the initiation of formal disciplinary proceedings."
- 7. Petitioner was instructed to do as follows to settle the matter :
 - a. sign an attached acknowledgment;
 - b. cease and desist from engaging in the violative conduct;
 - c. pay a \$975 penalty;
 - d. provide the BOP with a letter of correction.
- 8. The June 4, 2008 letter additionally stated that "[a]ny disposition by way of settlement will be a public record, and will have the same effect as an order of the Board." That letter further characterized the fine imposed by the BOP as a "civil penalty."
- 9. On or about June 16, 2008 petitioner signed the acknowledgement from the BOP; agreed to cease and desist from engaging in the cited conduct; paid the \$975 fine; and provided a letter of correction. (J-5)(J-7) The acknowledgment stated that "I am also aware that the action against me by the Board here is a matter of public record, and that the Board's letter and this certification are public documents."

10. On or about June 20, 2008, DMAHS became aware of the change in ownership and advised petitioner that the Medicaid provider number issued to the prior owner would terminate in sixty days. Petitioner was advised that it could submit an application to become a provider. (J-8)
11. On or about July 8, 2008, petitioner formally applied to DMAHS to be a Medicaid provider of pharmacy services. (J-9)
12. Question 36 of the provider application inquired whether petitioner's owners or any of its registered pharmacists had ever been the subject of any "past or pending license suspension, revocation or other adverse licensure action in this state or any other jurisdiction." Petitioner responded "no."
13. Question 37 of the application inquired whether petitioner's owners or any of its registered pharmacists had ever "been or currently are indicted, charged, convicted of or pled guilty or no contest to any federal or state crime or offense in this state or any other jurisdiction." Petitioner responded that Samir Awad (Awad), one of the owners of New Lucy's Pharmacy, had been arrested in 2002 for a signal traffic violation with a suspicion of driving under the influence (DUI) and that the incident had been dismissed on April 23, 2003.
14. Prior to his employment by petitioner, Girgis was charged with attempting to obtain a controlled dangerous substance by presenting a forged prescription in Old Bridge Township on April 30, 2007 in violation of N.J.S.A. 2C:35-13. The charge was amended to N.J.S.A. 2C:35-10.5 (e)(1) (unlawful possession of a prescription drug) and Girgis pled guilty to the charges. This was not divulged by petitioner in response to question 37 of the application.

15. On November 7, 2008 DMAHS wrote to petitioner indicating that the response to question 36 of the provider application "appear[ed] to be false" because BOP records indicated that "public disciplinary action" had been taken against petitioner's pharmacy license. DMAHS demanded that "full disclosure regarding any such disciplinary action be provided immediately." The certified mail copy of the November 7, 2008 letter was returned to DMAHS as unclaimed on November 27, 2008. (J-11) Thereafter, petitioner was contacted by phone and the letter was re-sent via telecopier on December 8, 2008
16. On December 9, 2008, Pamela Mandel, Esq. responded on behalf of petitioner. (J-12) She enclosed a May 27, 2008 letter from Girgis responding to the violations found by the BOP (J-5); the June 4, 2008 BOP letter (J-6); and the acknowledgment signed by the pharmacy in order to avoid "formal disciplinary proceedings." (J-7)
17. On January 20, 2009 DMAHS denied petitioner's Medicaid provider application. (J-13) The basis for the denial was as follows:
 - a. Submission of a false/fraudulent application pursuant to N.J.A.C. 10:49-11.1(d)(22).
 - b. Violation of BOP regulations N.J.A.C. 13:39-5.8(a)(1); N.J.A.C. 13:39-6.2(d); N.J.A.C. 13:39-7.19(c)(1); N.J.A.C. 13:39-7.12(a)(10);
18. On January 30, 2009 petitioner requested a hearing. (J-14)
19. On February 5, 2009 DMAHS issued an amended denial letter, (J-15), which stated that the materiality of the violations of N.J.S.A. 45:14-68(b)(9) and BOP regulation N.J.A.C. 13:39-7.19(c), pertaining to the entry of allergies, idiosyncrasies and chronic conditions in the patient profile, provided further support for denial of petitioner's application.

20. The February 5, 2009 letter from DMAHS additionally cited petitioner's failure to disclose the criminal charges against Girgis as further evidence of the submission of a false/fraudulent application.
21. On February 11, 2009 petitioner again requested a hearing.
22. Petitioner submitted a statement to DMAHS allegedly signed by Girgis on February 9, 2009 in which he denies any arrest or conviction of a crime or any wrongdoing in his pharmacy practice. (J-16)
23. On January 28, 2009 the BOP wrote to petitioner and advised that the penalty for the 2008 violations was paid and the matter was closed. (J-17)
24. DMAHS does not generally deny provider applications based on violations of BOP regulations. (J-18)
25. DMAHS does not recall denying any pharmacy provider applications for health and safety concerns based on BOP regulations. (J-18)

Tamer Girgis's Prior Employment and Criminal Background

Awad's testimony focused exclusively on his efforts to ensure that he accurately and completely answered question 37 of the Medicaid application, which pertained to prior criminal conduct. Awad offered no testimonial clarification of his thought process or actions relative to his response to question 36, which pertained to disclosure of "adverse licensure actions." Nor did Awad address the factual background which led up to the BOP preliminary findings of code violations, or the thinking behind the decision to waive a formal BOP proceeding in regard to those findings.

Awad testified that Girgis was employed by Lucy's Pharmacy when Awad took ownership on March 21, 2008. DMAHS questioned the veracity of this assertion, and

asked why wage and labor data failed to confirm Girgis's employment by Lucy's. Awad could offer no explanation. However, Awad stated the prior owner of the pharmacy shared the employment history of the existing employees with him, and had advised that Girgis had been employed at Lucy's since May 2007. The credibility of Awad's assertion that Girgis was an employee of Lucy's Pharmacy at the time Awad assumed ownership of the pharmacy is buttressed by the fact that Girgis, together with several other existing employees, submitted applications for employment on the first day that Awad acquired the pharmacy, March 21, 2008. (J-1) Applications received later were all submitted by individuals new to the pharmacy. (J-19) It is also noteworthy that Girgis had informed the BOP investigators on May 1, 2008 that he had been serving as RPIC since January 2008. (J-6)

Awad asked Girgis at his interview if he had a criminal record, and stressed the importance of providing a forthright answer. Girgis assured him that he had no criminal background to divulge. Awad did not ask for written confirmation that Girgis did not have a criminal background, nor did Awad conduct a formal criminal background check. Later, Awad and Girgis worked together to complete the Medicaid provider application. (J-9) Awad stressed the importance of complete disclosure of any information pertinent to the application. To emphasize that all prior criminal charges must be reported, Awad advised Girgis that he was disclosing his own arrest for driving while intoxicated, a charge that was ultimately dismissed. Awad testified that he told Girgis that regardless of when a prior incident occurred, or how insignificant it might now appear, it needed to be disclosed. Awad indicated that he repeated his inquiry several times. Girgis steadfastly denied having any criminal background.

On March 21, 2008 Girgis, and five other individuals, applied to work at New Lucy's Pharmacy. This group included existing and new employees. All the application forms submitted on March 21, 2008 included a criminal background inquiry, with the exception of the application form submitted by Girgis. Awad explained that not much thought was given to the choice of application form, which he stated was a template available at Staples or on the internet. Girgis's application form was in English, whereas the other applicants that day submitted forms which were in Spanish and English.

Applicants who applied for positions later that year completed English only forms where the criminal background question was again omitted. (J-19) I do not believe that the inconsistency in the application forms detracts from the credibility of Awad's testimony that he inquired whether Girgis had a criminal background. Awad was not a forceful witness, in part, due to some limitations in his facility with the English language. Nonetheless, he was a credible one. Awad's frustration at being lied to by Girgis was apparent in the tone of his voice when he testified that, to this day, he double-checks everything that Girgis handled during his service as RPIC.

Awad first learned of Girgis's criminal conviction when he received the amended DMAHS denial letter dated February 5, 2009. He confronted Girgis, who initially continued to deny that he had a criminal record and who supplied Awad with a written statement to that effect. (J-16) However, Girgis later admitted that he had lied. On February 20, 2009 counsel for petitioner prepared a certification for Girgis's signature in which Girgis admits the prior criminal conviction. Girgis signed the certification in Awad's presence. (P-1) Awad terminated Girgis's employment and testified that he will never reemploy him.

Petitioner offered the Girgis certification as further evidence that it had no knowledge of Girgis's criminal background when it filed its Medicaid provider application. Girgis states in his certification that Awad specifically asked him if he had a criminal record both at his employment interview and when he assisted Awad in completing the Medicaid application. Awad stressed that Girgis needed to disclose anything that could arguably be considered a criminal history, even a traffic violation. Girgis states in his certification that as a result of his purposeful concealment of his criminal background, the application was answered inaccurately. Girgis confirms that his employment at New Lucy's Pharmacy was terminated as a result.

Girgis's certification was accepted into evidence in accordance with the generally accepted notion that hearsay is admissible in administrative proceedings. However, in accordance with the "residuum rule," a factual finding cannot be based on hearsay alone. Weston v. State, 60 N.J. 36 (1972). As the Weston court stated:

Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal competent evidence in the record to support it.
[Id. at 51]

The Uniform Administrative Procedure Rules are in accord, and require that "some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness." N.J.A.C. 1:1-15.5(b). Hearsay evidence must be accorded the weight deemed appropriate when the nature, scope and character of the evidence, together with the circumstances of its creation and production, are taken into account. N.J.A.C. 1:1-15.5(a).

The circumstances surrounding the creation of the Girgis certification are troublesome. It was not written by Girgis, but rather by Awad and his counsel, and presented to Girgis for signature. However, Awad confirmed that Girgis signed the certification voluntarily. I was presented with no evidence that Girgis did so under duress, or received anything of value in return for his signature. To the contrary, upon signing the certification he lost his job. Affording much probative value to the Girgis certification remains problematic however because Girgis clearly is a less than honest individual. In an earlier signed statement (J-16) Girgis deceitfully denied any prior criminal conduct, and he admits in the February 20, 2009 certification that he lied. Nonetheless, the statements in the February 20, 2009 Girgis certification are entirely consistent with Awad's credible testimony. The certification thus serves the limited purpose of corroborating that testimony. The certification likewise reinforces the notion that Girgis was quite experienced at deceit. This renders believable Awad's contention that he questioned Girgis about his criminal background, and that Girgis readily convinced him that he was being forthright when he stated that he had no criminal history to report.

Based on the testimonial and documentary evidence, I **FIND** that Girgis was the existing RPIC at the pharmacy when it was acquired by petitioner. I further **FIND** that petitioner did inquire as to Girgis's criminal background both prior to retaining his services and during the process of completing the Medicaid application form and that Girgis purposefully concealed his criminal history from petitioner.

The DMAHS Investigation of Petitioner's Application

Cynthia White ("White") is employed by the Medicaid Inspector General, Special Projects Unit as a Medical Review Analyst. Until recently, she was employed by the Bureau of Program Integrity at DMAHS under the same title and performing the identical duties. White's role is to perform any background checks needed to ensure the completeness of Medicaid provider applications. She scrutinizes every application assigned to her, because Medicaid providers service the neediest of people. According to White, it is critical to ensure that individuals who seek to participate as Medicaid providers respond to application questions with complete accuracy. White makes a recommendation regarding approval, and the final agency decision is made after discussion by a committee.

White testified that if an application contains inaccurate information it is uniformly denied without further inquiry. White initially testified that the agency rationale for denying applications that contain false information is that, "Medicaid accepts only providers of the utmost integrity. The program must be able to rely upon the honesty of its providers when they submit claims for services rendered. As a result, it limits providers to those deemed to be reliable." White could offer no correlation between integrity and the making of an innocent mistake on an application, however. Nor could she comment on whether Awad was a person of integrity. She then clarified that although integrity is an agency concern, it is not its exclusive concern. In the end, she determines if there is good cause to deny an application based solely on a strict application of agency regulations. Even though petitioner has offered an explanation for his non-disclosures and contends that they were not willful, White would continue to deny his application simply because the answers to questions 36 and 37 were incorrect.

She stated that the regulations so require, noting that Medicaid providers must be persons who can accurately and completely submit claim forms, and that this is an additional rationale for such strict regulatory language.

White was assigned to investigate petitioner's Medicaid provider application during the months of August and September 2008. She became concerned that the answer to question 36 was false when she learned by visiting the Consumer Affairs website that public disciplinary action had been taken against petitioner's pharmacy license. A Licensee Verification Letter was later faxed to her by Consumer Affairs. (J-11) In the past, White would have contacted the BOP directly to obtain more information about the action taken against petitioner. However, the BOP had become non-cooperative, and no longer replied to DMAHS inquiries about licensure actions. Accordingly, White had been advised by her attorney to directly contact the applicant for any needed background information. White did not know why the BOP no longer cooperated with her agency, although she had heard conjecture that the BOP believed that DMAHS placed a greater significance on regulatory violations than was warranted.

White viewed this public disciplinary action as "adverse licensure action" within the meaning of question 36 of the Medicaid provider application. She testified on cross-examination that it could be possible for an applicant to mistakenly believe that he had avoided adverse licensure action by settling a case with the BOP, since by doing so he had avoided "formal disciplinary proceedings." However, White stressed that applicants who are confused about the import of a question have an obligation to seek clarification from DMAHS.

Petitioner asserts that "to this day," due to lack of cooperation by the BOP, DMAHS does not really know if public disciplinary action against petitioner actually took place. This argument ignores the information readily available on the internet via the Community Affairs website, the content of the licensee verification letter obtained by White and the information supplied by petitioner's counsel, all of which readily confirm that public disciplinary action took place.

Accordingly, I **FIND** that public disciplinary action was taken against petitioner. I further **FIND** that the DMAHS determination that petitioner had falsely answered question 36 was based both on the information regarding "public disciplinary action" obtained by White from Consumer Affairs, and the information subsequently supplied by counsel for petitioner in her December 9, 2008 letter. (J-12)

White concluded that the answer to question 37 was false because Girgis's criminal background was not divulged by petitioner. She uncovered Girgis's criminal record through a data base available to DMAHS personnel, promis/gavel. (J-10) Background documents and police reports subsequently obtained by White confirmed that in 2007, while working as a pharmacist, Girgis fraudulently filled out a blank prescription form in his own name in order to obtain adderal, a controlled dangerous substance, for his own use. Girgis was charged with attempting to obtain a controlled dangerous substance by presenting a forged prescription and ultimately pled guilty to a violation of N.J.S.A. 2C:35-10.5(e)(1), unlawful possession of a prescription drug. White was unaware that Girgis had concealed his criminal history from Awad when she recommended denial of petitioner's application.

Accordingly, I **FIND** that the DMAHS decision that petitioner had falsely answered question 37 was based exclusively on the information provided by White's promis/gavel search and the documents supplied by the police department, and included no consideration of any efforts made by Awad to inquire about Girgis's criminal background.

LEGAL ANALYSIS

Medicaid is a federally created program designed to ensure the availability of medical care to people who could not otherwise afford it. 42 U.S.C. § 1369(a). States participating in the program must submit a "State Plan" for federal approval that describes procedures through which providers will be selected and reimbursed and abuses will be prosecuted. 42 C.F.R. § 447.252(b). In New Jersey, the Medicaid program is administered by DMAHS pursuant to the New Jersey Medical Assistance

and Health Services Act (the Act), N.J.S.A. 30:4D-1 et seq. and N.J.S.A. 30:4D-7. The Act requires that DMAHS take all necessary steps, consistent with fiscal responsibility, for the proper administration of the New Jersey Medicaid Program.

DMAHS has, by regulation, imposed specific conditions on participation as a provider of pharmaceutical services. The process for enrollment as a Medicaid provider includes the submission of a formal application. N.J.A.C. 10:49-3.2. Pursuant to N.J.A.C. 10:49-3.2(f), DMAHS may deny an application if "good cause for exclusion of the provider from program participation exists under any of the provisions of N.J.A.C. 10:49-11.1(d)." The latter regulation specifies twenty seven examples of actions that "shall constitute good cause" for denial of an application. Here, DMAHS found good cause to deny petitioner's application under both N.J.A.C. 10:49-11.1(d)(22), (the submission of a false or fraudulent application) and N.J.A.C. 10:49-11.1(d)(7) (violations of laws, regulations or code of ethics governing the conduct of...regulated industries). Petitioner may not resubmit a provider application for a period of one year from the date of the denial. N.J.A.C. 10:49-3.2(d)(3).

Submission of a False or Fraudulent Application Relative to Girgis's Criminal
Background

Petitioner urges that DMAHS automatically denies any application that contains an inaccuracy. According to petitioner, DMAHS makes no effort to determine the reason for the inaccuracy, nor do its investigators attempt to ascertain whether the mistake on the application was made despite a reasonable effort to be truthful, accurate and complete. DMAHS's representative could offer no correlation between an inadvertent mistake and a lack of provider integrity or a lack of provider responsibility. Petitioner contends that this approach is inconsistent with the spirit and letter of the applicable regulations.

The factual record readily confirms that petitioner has accurately characterized what appears to be the DMAHS approach to review of provider applications. Certainly here, DMAHS gave no consideration to the fact that Awad was misled by an

accomplished prevaricator when he supplied an incomplete response to question 37 of his Medicaid application. However, I am unable to concur that DMAHS's actions were inconsistent with the provisions of N.J.A.C. 10:49-3.2 and N.J.A.C. 10:49-11.1.

The applicable regulations are clear and unambiguous. N.J.A.C. 10:49-3.2 states that DMAHS may terminate a provider agreement for any of the reasons denoted as "good cause" in N.J.A.C. 10:49-11.1(d). Petitioner urges that these examples of good cause must be analyzed in the context of whether the applicant's actions demonstrate a "lack of responsibility." But the regulatory discussion of "lack of responsibility" in N.J.A.C. 10:49-11.1(b) does not pertain to a denial of an application, but rather to suspension, debarment and disqualification of Medicaid providers.¹ Likewise, petitioner spent some time at hearing successfully demonstrating that DMAHS could not establish a connection between an inadvertent mistake and a lack of integrity. But the word "integrity" is nowhere found in N.J.A.C. 10:49-11.1.

This is not to say that there must not be some valid rationale behind the adoption of a regulation which permits denial of an application where the applicant has provided "false or fraudulent" information. The rationale clearly is to ensure a level of comfort with providers that will be responsible for public funds, compliance with complex federal and state regulations, and the delivery of medical services to New Jersey's poorest population. When there is a false statement on an application that level of comfort is diminished for any number of reasons. Petitioner focuses on the concepts of provider "responsibility" and "integrity," and White confirmed that she seeks to ensure that providers are responsible and have integrity. However, petitioner's focus is too narrow, and unduly limits DMAHS's flexibility to determine that a provider does not meet its standards. Thus, for example, as White noted at hearing, where an application contains false information, a question is correctly raised about that provider's ability to correctly

¹The regulation defines "debarment" as "exclusion from State contracting;" "disqualification" as a "debarment which denies or revokes a qualification to bid or otherwise engage in State contracting;" and "suspension" as "exclusion from State contracting for a temporary period of time." Petitioner here was neither suspended, excluded nor debarred.

complete the various forms needed to ensure Medicaid compliance. Indeed, our case law recognizes that due deference should be given to an administrative agency's interpretation of its own regulations. Delegation of authority to the agency should be liberally construed where, as here, the agency is concerned with the protection of public health and welfare. Barone v Department of Human Services, 210 N.J. Super. 276, 285 (App. Div., 1986).

Petitioner further suggests that the regulation requires that an error on the application must be willful in order to justify denial of a provider application. In support of this argument, petitioner urges that the word "false" means "intentionally untrue." Black's Law Dictionary defines the word "false" thusly:

The word "false" has two distinct and well-recognized meanings: (1) intentionally or knowingly or negligently untrue; (2) untrue by mistake or accident, or honestly after the exercise of reasonable care.

A statement is "fraudulent," according to Black's Law Dictionary if "it was falsely made, or caused to be made, with the intent to deceive." Accordingly, while in some contexts the word "false" may mean a willful omission, it cannot have this meaning in the context of the regulatory phrase "false or fraudulent" application. To conclude otherwise would create a redundancy in the regulatory language, and I am unable to believe that this was the agency's intent. Consistent with this view, the relevant case law has uniformly held that N.J.A.C. 10:49-11.1(d)(22) does not require evidence of a willful omission. Comm-Unity v DMAHS, HMA 1721-07 and HMA 3275-07, Initial Decision, (June 20, 2008), adopted Director (August 7, 2008) <<http://lawlibrary.rutgers.edu/oal/search.html>>; Mi Farmacia v DMAHS, HMA 9969-06, Initial Decision, (April 30, 2008) <<http://lawlibrary.rutgers.edu/oal/search.html>>; Surgi-Med Pharmacy and Jamil Tabussam v. DMAHS, HMA 3635-06, Initial Decision, (August 25, 2006), adopted Director (October 1, 2006) <<http://lawlibrary.rutgers.edu/oal/search.html>>.

Petitioner distinguishes these cases, and I would concur that upholding the agency action was undoubtedly easier under the facts presented by these earlier appeals. These prior cases find the excuses given for the omission on the application

to lack credibility, or find that the omission in question was irresponsibly negligent. Surgi-Med, supra. Here, Awad presented as an earnest individual, who did make an effort to inquire about Girgis and his background. Nonetheless, a finding that an application error was intentional is simply not required by the regulatory language. The Administrative Law Judge in Comm-Unity, supra found the applicant should have known that his application contained false answers, and upheld the agency denial of the application as a result. The agency adopted the judge's decision, but importantly, noted as follows:

While I agree with the ALJ, the regulation simply does not require that the provider intended to deceive, manipulate, or defraud Medicaid, in order for an application to be denied. Rather the mere submission of false information is grounds for denial. Indeed, a provider must be held to a high standard in order to preserve the integrity of the Medicaid program.

Finally, it is well established that where the action of an administrative agency is challenged, "a presumption of reasonableness attaches to the action...and the party who challenged the validity of that action has the burden of showing that it was arbitrary, unreasonable or capricious." Barone, supra., citing Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980). Petitioner did not meet its burden. Petitioner states that the DMAHS approach to denial of provider applications could lead to absurd results, with applications being denied due to minor errors, such as an inaccurate address or provider number. Were petitioner's application denied due to such trivial errors, the argument that DMHAS acted in an unreasonable or arbitrary fashion might be convincing. The omission in this petitioner's application, however, pertained to a matter that was far from minor or trivial, and indeed, goes to the very essence of sound pharmacy practice; that is, the proper dispensing of controlled dangerous substances. Under the facts presented here, I am unable to view DMAHS's action as arbitrary, capricious or unreasonable.

Submission of a False or Fraudulent Application Relative to Prior Adverse
Licensure Action

Petitioner argues that the answer supplied to question 36 of its provider application was not false because there was no adverse licensure action to divulge. DMAHS contends that the public disciplinary action taken by the BOP, as reflected on the Community Affairs website, and confirmed via a licensee verification letter, constitutes adverse licensure action within the meaning of question 36. As a result, petitioner submitted a "false or fraudulent" answer to question 36 when the prior action taken by the BOP was not divulged on its application.

Petitioner's argument lacks merit. Petitioner cites Doe v Department of Health and Human Services, 871 F. Supp. 808 (E.D. Pa. 1994) for the proposition that adverse licensure actions consist only of those events that place concrete restrictions on a licensee or otherwise result in formal discipline, such as probation, censure or reprimand. Petitioner contends that there were no restrictions on petitioner's license, no formal discipline imposed and hence no adverse licensure action here. But a fine is clearly formal discipline, and "public disciplinary action" is clearly a censure or reprimand. Petitioner further urges that even the BOP disagrees with the DMAHS conclusion that adverse licensure action took place here. But this argument is based exclusively on the speculation that the BOP no longer replies to DMAHS inquiries because it believes that the DMAHS is placing too much emphasis on its findings of regulatory violations. There is no evidence on record that this in fact is the BOP view. Nor would the BOP view be relevant here. DMAHS and only DMAHS is entrusted with the responsibility of wisely choosing Medicaid providers.

Alternatively, petitioner asserts that even if the BOP violations did constitute adverse licensure action, petitioner reasonably concluded that it had avoided adverse action by agreeing to waive formal disciplinary proceedings. This argument likewise lacks merit. There is no testimony from Awad that he in fact was confused by the question on the application, or by the import of his decision to settle the regulatory violation matter with the BOP. But more importantly, the regulations allow DMAHS to

deny petitioner's application simply because the answer was false, and without regard to any confusion experienced by Awad in understanding the question.

Finally, I disagree that question 36 was confusing. Petitioner agreed only to waive a formal proceeding challenging the BOP findings. A "proceeding" plainly refers to a hearing or trial. "Adverse licensure action" plainly refers to a penalty of some sort; in this instance a \$975 fine, and order of the BOP that would be a matter of public record. Thus, it should have been quite clear that adverse action was not avoided by waiving a formal proceeding, particularly since the correspondence from the BOP clearly indicated that the settlement of the violations would have the full force and effect of a BOP order. After lengthy cross-examination White stated that an applicant could reasonably be confused by the BOP correspondence received by petitioner. I disagree with White that such confusion is reasonable.

The Regulatory Violations

In addition to denying petitioner's application under N.J.A.C. 10:49-11.1(d)(22) for non-disclosure of the regulatory violations, DMAHS denied the application under N.J.A.C. 10:49-11.1(d)(7) due to the materiality of the violation pertaining to the maintenance of appropriate information in patient profiles. DMAHS stipulated that it does not generally deny applications based on violations of BOP regulations, and has never in the past deemed a violation of BOP regulations to create a health and safety concern. The record does not shed any light, however, on the gravity of the violations disregarded in the past. Furthermore, DMAHS's past conduct in no way precludes it from denying this application. Indeed, N.J.A.C. 10:49-11.1(d)(7) plainly permits DMAHS to do so. Petitioner's admitted violation was a serious one that clearly could negatively impact the health and safety of Medicaid recipients. Accordingly, petitioner has not met its burden of proving that the DMAHS denial of its application under N.J.A.C. 10:49-11.1(d)(7) was arbitrary, capricious, unreasonable or otherwise inconsistent with the applicable regulations.

CONCLUSIONS OF LAW

Based on the foregoing, I **CONCLUDE** that good cause existed for the denial of petitioner's application to be a Medicaid provider under N.J.A.C. 10:49-11.1(d)(22). I further **CONCLUDE** that good cause existed for the denial of petitioner's application under N.J.A.C. 10:49-11.1(d)(7).

ORDER

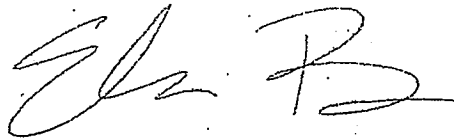
It is therefore **ORDERED** that the petition filed by New Lucy's Pharmacy be **DISMISSED**.

I hereby **FILE** my initial decision with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES** for consideration.

This recommended decision may be adopted, modified or rejected by the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, the designee of the Commissioner of the Department of Human Services, who by law is authorized to make a final decision in this matter. If the Director of the Division of Medical Assistance and Health Services does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR OF THE DIVISION OF MEDICAL ASSISTANCE AND HEALTH SERVICES**, Mail Code #3, PO

Box 712, Trenton, New Jersey 08625-0712, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

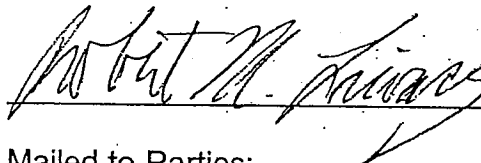


May 26, 2009

DATE

ELLEN S. BASS, ALJ

Date Received at Agency: May 27, 2009



Mailed to Parties:

DATE

cml

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

Witnesses:

For Petitioner:

Samir Awad

For Respondent:

Cynthia White

Joint Exhibits

- J-1 Bill of Sale of Business between Ann-Lu, Inc. t/a Lucy's Pharmacy and New Lucy's Pharmacy, Inc., dated March 21, 2008; and Employment applications of Tamer Girgis, Sheirly Cruz, Oscar Castillo, Elizabeth Calixto, Consuelo Gil Martria and Carmen Serrano
- J-3 Employment applications of Sheirly Cruz and Tamer Girgis
- J-4 May 29, 2008 letter from Joanne Boyer to Tamer Girgis, Samir Awad and Samir Patel
- J-5 June 16, 2008 letter from Tamer Girgis to Joanne Boyer
- J-6 June 4, 2008 letter from Joanne Boyer to Tamer Girgis with attachments and June 16, 2008 Girgis letter
- J-7 Certification of New Lucy's Pharmacy to the New Jersey Board of Pharmacy, signed by Tamer Girgis on June 16, 2008

- J-8 June 20, 2008 letter from Joseph R. Cicatiello to Tamer Girgis with certified mail receipt
- J-9 Pharmaceutical Provider Application of New Lucy's Pharmacy, Inc., which was received by the Division of Medical Assistance and Human Service on July 14, 2008
- J-10 Complaint-Warrant against Tamer Girgis, dated April 30, 2007; Incident Report #7015483, dated April 30, 2007; Record of Booking, dated April 30, 2007; and New Jersey Promis/Gavel Charge/ Disposition record entries, dated January 30, 2009
- J-11 November 7, 2008 letter from Cindi White to New Lucy's Pharmacy, Inc., with certified mail unclaimed receipt; License Verification Letter for Samirkumar Patel, dated October 6, 2008; License Verification Letter for Tamer Girgis, dated October 6, 2008; and License Verification Letter for New Lucy's Pharmacy, dated January 15, 2009
- J-12 December 9, 2008 letter from Pamela Mandel to Colleen DeMarks, attaching May 27, 2008 letter from Tamer Girgis to Robert Lake, June 4, 2008 letter from Joanne Boyer to Tamer Girgis, June 16, 2008 acknowledgement certification of New Lucy's Pharmacy, Inc. and June 16, 2008 letter from Tamer Girgis to Joann Boyer
- J-13 January 20, 2009 letter from Joseph Cicatiello to Tamer Girgis
- J-14 January 30, 2009 letter from Pamela Mandel to Robert Liwacz
- J-15 February 5, 2009 letter from Colleen DeMarks to Pamela Mandel
- J-16 Certified Statement of Tamer Girgis, dated February 9, 2009
- J-17 January 28, 2009 letter from Joanne Boyer to Samir Awad

J-18 New Lucy's Pharmacy, Inc.'s First Set of Interrogatories, dated March 17, 2009; New Lucy's Pharmacy, Inc.'s First Request for the Production of Documents, dated March 17, 2009; New Lucy's Pharmacy, Inc.'s First Request for Admissions, dated March 17, 2009; and Division of Medical Assistance and Human Services' Responses to New Lucy's Pharmacy, Inc.'s Interrogatories, Document Requests and Requests for Admission, dated March 30, 2009

J-19 Employment Applications for Stephanie Cortina, Vicky Toxtle, Maria Tere Simon, Diana Uribe, Celeste Torres, Marisoi Rivas, Johndill Nunez, Marisella Calero and Nikaurys Colon

P-1 Certification of Tamer W. Girgis, dated February 20, 2008